

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

HOWARD WHITE,

Petitioner

v.

DONALD T. VAUGHN et al.,

Respondents

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**CIVIL ACTION
NO. 02-767**

MEMORANDUM OPINION AND ORDER

RUFE, J.

November 16, 2004

Before the Court are Respondents' October 27, 2004 Objections to the September 2, 2003 Report and Recommendation ("R & R") of Magistrate Judge Arnold C. Rapoport that the above-captioned Petition for Writ of Habeas Corpus be denied and dismissed *without* prejudice. Petitioner Howard White has not filed any objections to this R & R. For the reasons set forth below, the Court now dismisses the Petition *with* prejudice.

DISCUSSION

For the sake of clarity, the Court restates the procedural history set forth in its January 9, 2004 Memorandum Opinion and Order:

On April 11, 1996, Petitioner filed the first of two pro se petitions under the Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-46. In this petition, Petitioner requested relief based on one claim – that Commonwealth witness Charles Atwell was supplied sexual favors in exchange for his alleged false eyewitness testimony implicating Petitioner (the "sexual favors claim"). The PCRA Court rejected this claim, and the Pennsylvania Superior Court affirmed on August 11, 2000. Commonwealth v. White, 764 A.2d 1131 (Pa. Super. 2000). The Pennsylvania Supreme Court denied allocatur. Commonwealth v. White, 771 A.2d 1284 (Pa. 2001).

Petitioner filed the instant pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on February 13, 2002, advancing the sexual favors claim and four additional claims for relief not raised in the aforementioned PCRA proceedings. Approximately two days later, on February 15, 2002, Petitioner

filed a second PCRA petition advancing these four additional claims. On December 9, 2002, the PCRA Court dismissed this second PCRA Petition as untimely. Petitioner filed a Notice of Appeal of this dismissal on January 9, 2003.

On June 6, 2003, Judge Rapoport, without knowledge of the December 9, 2002 PCRA Court dismissal or of Petitioner's appeal, recommended that Petitioner's pro se Petition for Writ of Habeas Corpus be denied and dismissed without prejudice as a mixed petition in accordance with Rose v. Lundy, 455 U.S. 509, 522 (1982). On June 20, 2003, Respondents, with knowledge of the PCRA Court dismissal but not of Petitioner's appeal, objected to this recommendation and argued that because the second PCRA petition had been dismissed as untimely and no appeal had been filed, Judge Rapoport's recommendation that the petition be dismissed on exhaustion grounds was improper. On July 29, 2003, this Court did not approve Judge Rapoport's R & R and remanded to Judge Rapoport for consideration on the merits of the sexual favors claim, which had been exhausted, and of the four procedurally defaulted claims where cause and prejudice or a fundamental miscarriage of justice could be established.

On September 2, 2003, Judge Rapoport, without knowledge of Petitioner's appeal, issued a second R & R that the petition should be denied without prejudice. Judge Rapoport rejected Petitioner's sexual favors claim on the merits and found Petitioner's other claims procedurally defaulted because Petitioner had not shown that failure to consider the claims would result in a fundamental miscarriage of justice. R & R at 8-13.

On September 12, 2003, Respondents objected to this second R & R on the sole ground that it recommended that the petition be denied and dismissed without prejudice. On September 24, 2003, Respondents received a copy of Petitioner's letter to the Clerk of Court [Doc. #22], in which Petitioner stated that on January 9, 2003, he had filed an appeal of the second PCRA Court order dismissing his petition as untimely. When Respondents filed their June 20, 2003 objections to the first R & R and their September 12, 2003 objections to the second R & R, they were unaware Petitioner had filed this appeal.¹

On September 25, 2003, after discovering that Petitioner had appealed the second PCRA Court dismissal, Respondents filed amended objections to the September 2, 2003 R & R. In these amended objections, Respondents conceded that Judge Rapoport's initial recommendation that the petition be

¹ For some reason, Petitioner's appeal was not docketed in the Pennsylvania Superior Court until August 18, 2003, and when counsel for Respondents contacted the Superior Court prior to filing Respondents' objections to the June 6, 2003 R & R, they were advised that no appeal had been filed.

dismissed for lack of complete exhaustion was correct and should be adopted.

In light of the above facts, on January 9, 2004, the Court dismissed the petition without prejudice in accordance with the Magistrate Judge Rapoport's June 6, 2003 R & R.

On August 12, 2004, the Superior Court of Pennsylvania affirmed the second PCRA Court Order dismissing White's petition as untimely. On October 4, 2004, Petitioner filed a Motion to Reinstate Habeas Corpus to which Respondents did not object. Accordingly, the Court granted the Motion by Order dated October 19, 2004. In the same Order the Court gave the parties ten days to file objections to Magistrate Judge Rapoport's September 2, 2003 R & R.

On October 27, 2004, Respondents objected solely on the ground that the R & R recommended that the petition be dismissed without prejudice. Petitioner has not filed any objections to the R & R. Because Petitioner has already had state direct and collateral review of his conviction, and because the Superior Court of Pennsylvania dismissed Petitioner's second pro se PCRA petition as untimely, the Court sustains Respondents' objections and dismisses the petition with prejudice.

An appropriate Order follows.

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ORDER

AND NOW, this 16th day of November, 2004, upon careful consideration of the pleadings and record, and after review of the September 2, 2003 Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport [Doc. #20] and Respondents' Objections thereto [Doc. #31], and in light of Petitioner's failure to file any objections, it is hereby **ORDERED**:

1. Respondents' Objections [Doc. #31] are **SUSTAINED**;
2. The September 2, 2003 Report and Recommendation is **APPROVED** and **ADOPTED** except for its recommendation that the petition be denied and dismissed without prejudice;
3. The Petition for Writ of Habeas Corpus is **DENIED** and **DISMISSED WITH PREJUDICE**;
4. Because the Petition does not make a substantial showing of the denial of a constitutional right, the Court declines to issue a Certificate of Appealability; and
5. The Clerk of Court shall mark this case **CLOSED** for administrative purposes.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ